DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

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Honorable James Orenstein
Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 12101

Re: *In re Holocaust Victim Assets Litigation*
Application of Burt Neuborne CV-06-983 (ERK) (JO)

Your Honor:

Mr. Neuborne's July 21, 2006 filing raises a few points which require a very brief reply.

1. According to page 2 of Mr. Neuborne's recent filing, the alleged value of the tax exemption to the settlement fund he claims he created inexplicably has grown from $25 million to $50 million. However, Mr. Neuborne's March 17, 2006 Declaration states, at page 23, that the tax exemption he and Melvyn Weiss persuaded Congress to enact resulted in "income tax savings for the settlement fund of approximately $25 million . . . ."

Moreover, the actual value of the savings to the settlement fund is immaterial to Mr. Neuborne's compensation, because the number of hours devoted to obtaining that tax exemption has not changed, and if he is entitled to any compensation at all (notwithstanding the massive net loss resulting from his deal to accelerate the last tranche of money in return for having the settlement fund pay administrative costs of the Deposited Assets claims process), Mr. Neuborne's entitlement to fees is limited to lodestar compensation for the number of hours devoted to the tasks that generated the monetary benefits to the settlement fund. *See* U.S. Survivors' March 17, 2006 Opposition Memo at 34-40 and July 21, 2006 Letter Brief at 17.

2. On the issue of judicial estoppel, Mr. Neuborne emphasizes his November 2000 fee submission to German Foundation Fee Arbitrators Kenneth Feinberg and Nicholas DeB Katzenbach, which allegedly states "that he would seek hourly lodestar fees for work as Lead Settlement Counsel in the Swiss Bank case." But the German Fee proceedings were, as has been widely reported, *confidential. See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 323 (E.D.N.Y. 2002); Wise, "Lawyers Get $60 Million in Fees for Holocaust Settlement," *N.Y. Law Journal*, June 15, 2001. Not even the other attorneys filing fee requests with the German Fee arbitrators received other

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lawyers' submissions.

Of course, the elephant-in-the-room, in light of this secret "disclosure" to the German Fee Arbitrators is why Mr. Neuborne never stated *for the record in this case that his "pro bono" status was over and that he would be seeking compensation for "post-settlement work?"* As the U.S. Survivors have argued, Mr. Neuborne had a duty to disclose any changed circumstances in this case, and did not. *See* cases cited in Objectors March 17, 2006 Opposition Memo at 19-21 and July 21, 2006 Letter Brief at 7. This failure of Mr. Neuborne make an affirmative disclosure in this case is tantamount to fraud on the class. *Id.*

Mr. Neuborne also cites an additional U.S. Supreme Court case in support of his argument that "detrimental reliance" is an element of judicial estoppel. However, the new case, *Zedner v. United States*, 547 U.S. ___, 126 S.Ct. 1976 (2006), does not hold that "detrimental reliance" is an element of judicial estoppel. On this point, *Zedner* is no different than *New Hampshire v. Maine*, 532 U.S. 743 (2001), which the U.S. Survivors discuss at pages 7-8 of their July 21, 2006 Letter Brief. Further, as the U.S. Survivors' brief shows, all federal courts to address the question hold that there is no "detrimental reliance" requirement for judicial estoppel. *Id.* There is nothing in *Zedner* that changes the federal doctrine of judicial estoppel in the year 2006 to add a requirement of "detrimental reliance."

3. Mr. Neuborne also exaggerates the record positions of the other plaintiffs' class committee members who support his fee request. His July 21, 2006 brief states that "six co-settlement counsel have filed declarations with the Court . . . asserting that they understood that movant would seek reasonable compensation for his post-settlement work." July 21, 2006 brief at 8. This is not an accurate reflection of the supporters' statements. The declarations state, using double negatives, that the attorneys had no reason to believe Mr. Neuborne would not seek compensation. *See, e.g.* Declarations of Melvyn Weiss at 1-2 ("Although I never discussed the issue of compensation directly with Mr. Neuborne, it was my assumption that he would seek compensation . . . ."); Declaration of Morris Ratner at 2 ("I never understood that the settlement implementation work to be performed by Lead Settlement Counsel would be uncompensated, and have never heard Professor Neuborne suggest he would not seek a fee for such work."); Declaration of Irwin B. Levin and Richard Shevitz at1-2, paragraph 3. ("Although we never discussed the issue of compensation directly with Mr. Neuborne, it was our assumption that no one could be asked to accept such an intensely demanding multi-year responsibility without the prospect of reasonable compensation."). Not one of the supporting attorneys states affirmatively that he actually knew Mr. Neuborne would seek compensation.

More importantly, not one of the supporting attorneys states that he learned from the 2000 confidential filing with the German Fee arbitrators, the January 2001 attorney fee hearing, nor the 2002 Washington University Law Review article, that Mr. Neuborne had changed from working "pro bono" to working "for lodestar compensation." Yet these are the sole sources which Mr. Neuborne contends informed the class and the public that his status had changed.

4. Finally, on the issue of compensation as "general counsel" to the District Court, Mr. Neuborne argues that the logic if the U.S. Survivors' position is that "125 separate counsel" would have been required to accommodate the competing interests for the $1.25 billion settlement fund.

DUBBIN & KRAVETZ, LLP
701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847 • TELEPHONE (305) 357-9036

Although this issue is not directly raised by the fee request, the U.S. Survivors note that this *reductio ad absurdum* argument is simply incorrect.

At the time of the settlement, there were five separate certified classes of claimants: Deposited Assets; Slave Labor I – Germany; Slave Labor II – Switzerland; Refugees; and Looted Assets. Under *Amchem Products Inc., v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), even Mr. Neuborne acknowledges that those five classes would ordinarily be entitled to separate representation.

Further, inasmuch as the Plaintiffs' committee had recognized two other discrete groups as plaintiffs in the case, i.e. Sinti-Roma and homosexual victims of Nazi persecution, these two groups would have needed representation *for the Looted Assets Class* allocation. There was no separate ethnic, religious, or other categorical breakdown for the Deposited Assets, Slave Labor I, Slave Labor II, or Refugee classes, so these groups would have had no need for separate representation within those classes.

It is also a complete fallacy to argue that the existence of class members living in different countries created a discernable allocation category *within any* of the classes at the time of the settlement. No geographic distinctions among claimants were part of the settlement agreement, period. It was the Special Master's proposed plan of allocation and distribution, published in September 2000, after the settlement amount was approved as fair by Judge Korman in July 2000, that introduced the geographical distinctions among Looted Assets Class members. These later-introduced geographic divisions became the flash-point in the allocations challenges and appeals. To this day, there are no geographical distinctions within the Deposited Assets, Slave Labor I or Slave Labor II, or Refugee classes and awards. So, there could not possibly have been a need for "125 separate lawyers."

Yet, if in fact Mr Neuborne was aware at the time the District Court approved the settlement in July 2000 that such geographic distinctions *were going to be introduced into the case* in September 2000 and remained silent about that prospect, it is only a further reflection on the extent to which he failed to represent the class members adequately here. While the validity of the settlement on this score is not currently before the courts, his effort to be compensated for that conduct most certainly is.

Finally, Mr. Neuborne cites the case of *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) to support his compensation for defending the District Court's actions rather than advocating for the rights of the class members. *Lazy Oil* is not analogous to this case. First, *Lazy Oil* involved a motion by objectors, who had been the named plaintiffs in the case, to disqualify class counsel from representing the class members who agreed with the settlement. This current petition is not a motion to disqualify but a request by Mr. Neuborne to be compensated from settlement funds even though, as he freely admits, he defended the Judge's "discretion" at the same time he disagreed with it.

More importantly, in *Lazy Oil*, the District Court had found that there was *no difference* in the interests of the objectors and the class members who approved the settlement. In contrast, the District Court's insistence that 75% of the Looted Assets Class funds be given to agencies serving the Former

Soviet Union could only occur to the direct detriment of those U.S. and Israeli survivors denied benefits from those funds. It was a zero sum game and the "Lead Plaintiffs' Counsel" defended the Court rather than advocate for those in the class he believed were entitled to greater benefits from the settlement.

There is no precedent providing that a Plaintiffs' Lead Settlement Counsel owes a duty to the *District Court,* as opposed to class members injured by the court's actions. Thus, the more relevant authorities are *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 260-61 (2d Cir. 2001)(adequacy of representation required "at all times" throughout the litigation), *aff'd by an equally divided court*, 539 U.S. 111 (203) and *Gonzalez v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973)(primary criterion for adequacy is "whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class"). *See also Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940).

Though the result of the outcome of the "novel pre-commitment strategy"advanced by Mr. Neuborne was affirmed by the Second Circuit, that does not justify taxing the limited amount of settlement funds to pay the attorney who abandoned the majority of the class in his defense of the District Court. Further, as is now painfully obvious, the foundation of the "pre-commitment strategy" – Lead Counsel's "pro bono" status – turns out to have been false all along.

Respectfully,

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.

cc: Robert Swift, Esquire
Samuel Issacharoff, Esquire

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701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847 • TELEPHONE (305) 357-9036